Jurisdictional Statement

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81-317

No._____

IN THE

Supreme Court of the United States

October Term, 1981

DAVID P. WEINBERGER,

Appellant

v.

THE FLORIDA BAR,

Appellee

JURISDICTIONAL STATEMENT ON APPEAL, LOCAL RULE 15, 28 U.S.C. §§ 1257 (2), 2103, 2014

Respectfully submitted by:

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QUESTIONS PRESENTED:

I.

Whether FIRST AMENDMENT GUARANTEES OF FREE EXPRESSION PROHIBIT A STATE FROM IMPOSING SANCTIONS AGAINST A DULY LICENSED ATTORNEY UNDER THE UNIFORM CODE OF PROFESSIONAL RESPONSIBILITY FOR FILING PLEADINGS AND BRIEFS DURING SELF-REPRESENTATION IN FEDERAL COURTS WHICH ALLEGEDLY DENIGRATED THOSE FORUMS AND THE ADMINISTRATION OF JUSTICE, IN THE ABSENCE OF OBJECTION FROM OR DISCIPLINE BY THOSE FEDERAL COURTS.

II.

Whether THE DUE PROCESS OR EQUAL PROTECTION GUARANTEES OF THE FOURTEENTH AMENDMENT PROHIBIT A STATE FROM CONVICTING A MEMBER OF ITS INTEGRATED BAR FOR VIOLATION OF THE UNIFORM CODE OF PROFESSIONAL RESPONSIBILITY

(A) ABSENT THE REQUIRED FINDING OF PROBABLE CAUSE AS TO MISCONDUCT,

(B) WITHOUT JUDICIAL RULING ON TIMELY CHALLENGES TO THE VALIDITY, EITHER FACIALLY OR AS APPLIED, OF RELEVANT DISCIPLINARY RULES,

AND

(C) ON THE BASIS OF UNAUTHORIZED REMARKS MADE BY THE MEMBER'S ATTORNEY DURING ORAL ARGUMENT IN AN ORIGINAL PROCEEDING BEFORE A STATE SUPREME COURT WHICH EXPRESSED AN UNFAVORABLE OPINION OF THE ACCUSED'S CONDUCT IN VIOLATION OF THE UNIFORM CODE OF PROFESSIONAL RESPONSIBILITY.

LIST OF ALL PARTIES

Appellant is a member (#187422) on Respondent's roll of persons admitted to the practice of law in the State of Florida. He was enrolled on Dec. 19, 1974, has been a dues-paying member continuously since then, and has been admitted to the federal bar in all districts of Florida as well as the United States Fifth Circuit Court of Appeals. This is the first and only disciplinary action brought against Appellant anywhere.

Appellee is an administrative body directly supervised by the Supreme Court of Florida in the exercise of jurisdiction granted by Art. V, § 15, 1968 Constitution, State of Florida. It is an "integrated" bar which operates under color of state law for purposes of Amendment XIV, § 1, United States Constitution.

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"Code of Professional Responsibility by State, 1980," National Center for Professional Responsibility, Chicago Ill. 7
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OPINIONS BELOW

The official report of *The Florida Bar v. Weinberger,* Supreme Court of Florida, Docket No. 59, 191 is found in the West Publishing Company's *Southern Reporter* at 397 So.2d 661 (Fla., March 19, 1981), *reh.den.* May 22, 1981. An unofficial report may appear in the *Florida Law Week* published at Tallahassee, and a summary of the opinion below may have appeared in Appellee's *Florida Bar News.* The opinion of the Supreme Court of Florida sought to be reviewed here is reproduced as the first item in the accompanying integral appendix.

A fair reading of the decision of the Supreme Court of Florida might intimate Appellant had used profane or other unseemly, grossly inappropriate language. This is not at all the case. His "public statements" concerning the courts were limited entirely to written material in case files on his own claims which, but for the prosecutorial zeal of The Florida Bar, would have been "little noted nor long remembered." At no time while litigating his own claims against the State of Florida in 1976-77 was Appellant accused of misconduct or contempt by the forums in which he appeared for himself.

JURISDICTION OF THIS COURT

As to appeal: Disciplinary Rules DR 1-102(A) (6) and 7-106 (C) (6) of the Florida Code of Professional Responsibility for lawyers were promulgated by the Supreme Court of Florida in a capacity more legislative than judicial. See *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 252 (7th Cir., 1975). They are the legal equivalent of a duly enacted state statute of general application for purposes of 28 U.S.C. § 1257 (2). Many states other than Florida have adopted identical rules from the 1969 ABA Model Code of Professional Responsibility. The validity of these rules as being repugnant to the Constitution of the United States, either facially or as sought to be applied, was timely drawn in question in the proceedings below. The Florida Bar referee's report summarily rejected Appellant's contention of Constitutional infirmity [Conclusion of Law I.B.]. Though this issue was raised in briefs Appellant submitted to the Supreme Court of Florida, that court never adjudicated the facial validity of DR 1-102(A) (6) and DR 7-106(C) (6) or validity of their application in this or any prior case known to Appellant.

The order of the Supreme Court of Florida issued on March 19, 1981 [Appendix herewith] became final on May 22, 1981 when that court denied a timely petition for rehearing. Notices of appeal (contained in the attached Appendix) were filed on May 29, 1981 and July 7, 1981 in the Supreme Court of Florida.

28 U.S.C. § 1257 (2) confers jurisdiction of this appeal on this Court. Such jurisdiction is confirmed by *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978) and *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978). See also *Mildner v. Gulotta*, 405 F. Supp. 182, 196 (D.C. E.D. NY, 1975), *aff'd.* 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976.)

As to Review by Writ of Certiorari: If an appeal is not granted here, this Court in empowered by Act of Congress, 28 U.S.C. § 1257 (3), to issue such writ in the alternative. See also 28 U.S.C. § 2103.

PROVISIONS OF THE UNITED STATES CONSTITUTION INVOLVED:

AMENDMENT XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble; and to petition the Government for a redress of grievances.

[Respondent is subject to the First Amendment contained in the "Bill of Rights." See U.S.C.S., Constitution, Amendment I, citations at n. 3.]

INTEGRATED STATE BAR DISCIPLINARY RULES INVOLVED

DR-1-102 (A) (6):

Misconduct. A lawyer shall not: . . . engage in any other conduct that adversely reflects on his fitness to practice law.

DR-7-106 (C) (6):

Trial Conduct. In appearing in his professional capacity before a tribunal, a lawyer shall not: . . . engage in undignified or discourteous conduct which is degrading to a tribunal.

[These rules were adopted by the Supreme Court of Florida in the exercise of its jurisdiction over the practice of law granted by the 1968 Constitution, State of Florida, Art. V, Sec. 15. They are adopted *verbatim* from the ABA Model Code of Professional Responsibility. See *VIII Martindale-Hubbell Law Directory, 1981*, Part VIII, pp. 3M, 37M.

As many as 39 states may have disciplinary rules the same as DR-1-102(A) (6), and up to 42 state bars and bar associations may have adopted DR-7-106(C) (6) from the ABA Model Code of Professional Responsibility. See *Code of Professional Responsibility by State, 1980*, National Center for Professional Responsibility, Chicago, IL.]

STATEMENT OF THE CASE AND MATERIAL FACTS:

This bar disciplinary proceeding did not originate from a client complaint. Attorneys hired by the State of Florida to defend Appellant's 1976-77 federal court civil rights litigation filed charges with The Florida Bar after that litigation ended. They learned appellant had challenged the legality of their retention in a letter to the Comptroller of Florida. Shortly after this case began, an appellate decision in Florida held that only that State's attorney general could represent Florida in the federal courts [353 So.2d1251]. Nevertheless, in an independent action brought by appellant through counsel which informed the Supreme Court of Florida that this proceeding had commenced, judicial review of the complaining attorneys' compensation from public funds was refused.

This disciplinary action was brought under rules contained within the *Integration Rule of The Florida Bar, September, 1978* promulgated by the Supreme Court of Florida in the exercise of its original jurisdiction over regulation of law practice in that State. Those rules define "probable cause," authorize a duly constituted grievance committee of The Florida Bar to return such findings in prosecutions for violation of the Florida Code of Professional Responsibility, and require a finding of probable cause of misconduct before a formal complaint can be served on a member of The Florida Bar. The grievance committee in this case found probable cause to believe DR 1-102(A) (6) had been violated, although "probable cause" is defined as

> "a finding by an authorized agency that there is cause to believe that a member of The Florida Bar is guilty of misconduct justifying disciplinary action" [Rule 11.01(3), *Integration Rule of The Florida Bar, September, 1978]*

and the grievance committee's report stated

> ". . .we do not feel [Appellant] has engaged in willful misconduct in violation of the Code of Professional Responsibility. . ."

and

> ". . .any suspension of [Appellant] from all or part of the practice of law should not be on the basis of misconduct but rather on the basis of possible mental problems. . ."

As to Petitioner's possible incapacity, the grievance committee report was decidedly equivocal. It suggested

> "(t)hat Bar counsel explore with [Appellant] the possibility of under going psychiatric examination in order to determine if he has mental problems which affect his competence to practice law."

The instant grievance committee was not a special one [Rule 11.03(2) (b), *id.*] possessed of any particular qualifications or fitness to make this recommendation.

Notwithstanding the preamble to Rule 11.05, *Integration Rule of The Florida Bar, September, 1978,* namely:

> No formal complaint shall be filed by The Florida Bar in disciplinary proceedings against a member of The Bar unless either a grievance committee or the Board of Governors shall first find that probable cause exists to believe that the accused is guilty of misconduct justifying disciplinary action or unless the accused has been determined or adjudged to be guilty of the commission of a felony. The finding of probable cause shall be made by a grievance committee as hereinbefore provided or by the Board of Governors as hereinafter provided,

a complaint was served on Appellant which charged misconduct, not incapacity. From the outset, Appellant waived confidentiality.

Florida Rules of Civil Procedure govern Bar disciplinary proceedings. Cases on those rules require that incapacity be

raised in pleadings rather than by motion. After service of the complaint but before trial, Appellee nevertheless moved to have Appellant submit to a compulsory psychiatric examination. The referee however took such motion under advisement and never ruled on it at any time.

The Bar's complaint contained no charges of crime, immorality, unprofessional conduct in the course of client representation or of deceit/fraud/misrepresentation/dishonesty at any time. Six paragraphs (¶¶ 4-9) set forth matters alleged to violate Florida's Code of Professional Responsibility. ¶ 4 of the complaint cited Appellant for his resort to a Florida prosecutor's office when an attorney employed by that State refused to furnish public records. In ¶ 5 of its complaint, the Bar set out the complaining attorney's charges they were "repeatedly harassed" by Appellant and that he had threatened to file grievance against them with the Bar arising from his own litigation. ¶¶ 6-9 dealt with remarks filed in Appellant's 1976-77 federal court pleadings during his own litigation with the State of Florida. At no time was Appellant reproached by the Miami federal trial court or the New Orleans federal appellate court for his conduct or the content of his submissions. The complaint did not charge Appellant with conduct threatening the administration of justice, or with imputing improper motives to any judge or court.

During pretrial discovery Appellee admitted the word "lawyer" used in DR-1-102(A) (6) and other Disciplinary Rules in the *Integration Rule of The Florida Bar, September, 1978,* is used in its common and ordinary meaning. The Bar balked, however, when asked to admit that Appellant was not functioning as a "lawyer" when representing himself. Appellant introduced a quotation from the Bar's legislative representative, himself a former Bar officer of long service, showing that the definition of "practice of law" is unclear. The Bar avoided a discussion of how a member's "fitness" under the catchall DR-1-102(A) (6) could be determined if "practice of law" is imprecisely defined. Appellant sought unsuccessfully in discovery to have the Bar disclose how he was placed on notice his own personal rights would be curtailed by virtue of assuming a place on Appellee's membership roll, absent crime, immorality, moral turpitude, untruthfulness/deceit/dishonesty/fraud or judicially-determined contempt.

Appellant's answer to the complaint raised due process/equal protection issues over the lack of a probable cause finding of misconduct before service of a complaint, made First Amendment argument that the conduct complained of was protected when done in the course of self-representation, and challenged the validity, either facially or as applied, of DR-1-102(A) (6) on which the complaint was brought. Exhibits accompanied Appellant's answer to the complaint which showed that judges of the Miami and New Orleans federal courts were making public statements decrying the state of civil dockets there in 1976-77. One such public statement was made by a jurist who sat first as a trial judge and then on the appellate bench. He warned that no further civil cases would be heard at Miami unless additional federal judges were appointed there. Appellant was thus far from the only one frustrated by this state of judicial affairs.

At trial before a Bar referee, Appellee was permitted over objection of Weinberger's counsel to amend its complaint and include DR-7-106(C) (6) as a basis for prosecution. This rule uses not only the word "lawyer" in its ordinary sense but applies specifically to appearance "in his professional capacity before a tribunal." Appellant's counsel timely objected to the validity of DR-7-106(C) (6) at trial. The Florida Bar never offered authority for the propositions that one of its members is *always* a "lawyer" or that he appears "in his professional capacity before a tribunal" when representing himself, for purposes of enforcing its Code of Professional Responsibility. At the trial Weinberger offered a psychiatrist's report and testimony of a clinical psychologist/attorney to interpret that report. This evidence demolished the Bar's case that Appellant was somehow unfit to practice by reason of incapacity. Subsequent to publication of the referee's report, the Bar admitted in a written filing that this prosecution was based on misconduct and not mental or emotional impairment.

The parties twice exchanged post-trial briefs. On such occasions Appellant again raised the Constitutional questions of due process/equal protection for want of a probable cause finding of misconduct returned before service of the complaint, invalidity of DR-1-102(A) (6) and DR-7-106(C) (6) as void for vagueness and overbroad, and that this prosecution sought to penalize the exercise of rights protected by the First Amendment.

The referee's report totally failed to address the question of why Appellant could be tried for misconduct in the face of two comments by the grievance committee in its report exonerating him of willful misconduct and a third comment intimating he was incapacitated. The referee summarily dismissed Weinberger's challenges to the validity of both of the Disciplinary Rules involved here, and recommended a one-year suspension without automatic reinstatement. Appellant would have had to apply annually until demonstrating "rehabilitation" warranting reinstatement. Prior to oral argument before the Supreme Court of Florida, the Bar's Board of Governors voted to reduce the proposed penalty from the one year suspension recommended by the referee to a 91 day suspension. Reinstatement would still not have been automatic; under the *Integration Rule of The Florida Bar, September, 1978,* suspensions for more than 3 months require proof of rehabilitation.

When the referee's report was filed with the clerk of the Supreme Court of Florida, Appellant moved it be quashed for lack of the required probable cause finding of misconduct. This motion was denied. Prior to oral argument, the parties exchanged briefs filed with the Supreme Court of Florida in which the due process/equal protection and First Amendment arguments were again made. In deference to the wishes of his counsel, Weinberger was not present when oral argument was had before the Supreme Court of Florida. During that argument without ever obtaining client consent to do so and in violation of the Code of Professional Responsibility, Appellant's counsel expressed personal disapproval of Appellant's conduct and actions. The Supreme Court of Florida seized on that improper opinion to justify its decision. 397 So.2d at 662.

The opinion of the Supreme Court of Florida sought to be reviewed here would not go along with the suspension recommendation of either the Bar's referee or its Board of Governors. As did the referee, the Supreme Court of Florida avoided the question of how Appellant could be charged and tried for misconduct without the required prior finding of probable cause. This issue was again ignored when the petition for rehearing was denied, making the opinion of the Supreme Court of Florida final. That court never came to grips with Weinberger's challenges to the facial validity of DR-1-102(A) (6) or DR-7-106(C) (6) or their application, or his First Amendment defense.

Appellant's conduct was not such as to constitute a major infraction of the Florida Code of Professional Responsibility, as major misconduct is defined in the *Integration Rule of The Florida Bar, September, 1978*. That rule authorizes the Bar to attempt settlement of cases. Appellant offered to freeze the state of his practice until he passed the ethics section of the Florida Bar Examination, which he was not required to take in October, 1974. This offer was totally ignored and no settlement attempt was made by the Bar in this case (although during pretrial proceedings the referee twice stated the matter could be settled by Appellant's resignation from the Bar). During its deliberations the grievance committee learned Weinberger was representing two members of this Court's bar, Maryland and Missouri attorneys residing in South Florida, in an attempt to overturn the Southern District of Florida rule requiring Florida Bar membership for admission to the federal bar there. The real motive behind the Bar's zeal in pursuing this case for three years is to engage in reprisal against Appellant for this effort and his challenge to the compensation paid by the State of Florida to the complaining attorneys (one of whom was a Florida State Senator when the firm was retained). The opinion below substitutes the judgment of the Supreme Court of Florida as to contempt for that of the federal courts in which Appellant pressed his claims against the State of Florida. This has been done in the guise of regulating the practice of law when no client was involved and where no threat whatsoever was posed to the administration of justice.

MANNER AND TIME FEDERAL QUESTIONS WERE RAISED BELOW

Due process/equal protection federal question arising from lack of a prior probable cause finding of misconduct before service of a complaint: Weinberger raised this issue in his answer to the Bar's complaint, in filings before trial by a Bar referee, at the trial, in post-trial briefs exchanged with Appellee, in a motion to quash the referee's report made in the Supreme Court of Florida, in briefs submitted to that court, and in a petition for rehearing in the court below. Neither the Bar referee nor the Supreme Court of Florida ever addressed this issue.

Constitutionality of Disciplinary Rules 1-102(A)(6) and 7-106(C)(6): This federal question was raised by Appellant's answer to

the complaint, at trial, in post-trial briefs exchanged with the Bar and in briefs submitted to the Supreme Court of Florida. The referee, a real estate lawyer, summarily disposed of this issue by rejecting a claim of facial invalidity and ignoring possible invalid application of these rules. The Supreme Court of Florida did not address this matter at all in its opinion.

First Amendment defense: Appellant first addressed himself to this matter in his answer to the complaint. He again raised it at the trial, in briefs exchanged with Appellee after trial, and in briefs submitted to the Supreme Court of Florida. Neither the referee nor the Supreme Court of Florida came to grips with the question of whether the activities complained of in the six charging paragraphs of the complaint were exercises of rights protected by the First Amendment to the United States Constitution.

Some or all of the three preceding federal issues were discussed at oral argument before the Supreme Court of Florida.

The issue of whether Petitioner was denied due process of law when his counsel violated the Florida Code of Professional Responsibility for lawyers in oral argument before the Supreme Court of Florida by expressing an unauthorized, adverse opinion of his actions of which that court took notice in its decision [397 So.2d at 662] could not have been raised before submission of this petition. Appellant's counsel left the case after moving for rehearing in the court below. The Constitutional question of whether Appellant was denied due process of law by failure of the Supreme Court of Florida, as a court of original jurisdiction, to review timely Constitutional defenses arises here for the first time.

WHY PLENARY REVIEW IS REQUIRED

More than three quarters of the States in America have adopted both of the sweeping Disciplinary Rules challenged here. Appellant is without knowledge that the validity of either rule has been upheld in any judicial proceeding, State or federal. The situation where a State's Supreme Court, sitting as a court of original jurisdiction, decides a lawyer's fate in disciplinary proceedings with no further judicial review except by federal court scrutiny is not unsual now that more than half of the

States have fully integrated their bars. Half a million persons in all States of America are or soon will be duly licensed practitioners in law. They have a stake in knowing that full review by appeal will be available in this Court if it is not provided by the States, without the necessity of maintaining an independent action in subordinate federal courts. Those forums are reluctant to entertain matters of the sort presented here for review. See Johnston, conclusion to comment, *"ABA Code of Professional Responsibility: Void for Vagueness?,"* 57 N.C.L. Rev. 671, 693 (1978-9).

Where a bar member is convicted of misconduct without the required prior finding of probable cause as to such misconduct, and his timely challenges to disciplinary rules and First Amendment defenses are ignored by the entire State court judicial system, where is he to get full judicial review if he does not obtain it here? It is unthinkable in the American jurisprudential system that one trained in law must suffer egregious denials of due process of law at the hands of a State without one level of full judicial review. More and more legal scholars, thinkers and writers are coming to question the 12 year old ABA Model Code of Professional Responsibility. See, e.g., Prof. Sutton's *"How Vulnerable is the Code of Professional Responsibility?,"* 57 N.C.L.Rev. 497 (1978-9). The importance of the questions presented by this case, the number of people affected by any decision this Court might issue here, and the husbanding of judicial labor more than justify plenary review in this judicial forum. Briefing and oral argument should be granted for the reasons which follow.

The Supreme Court of Florida has decided a federal question in a way which conflicts with federal appellate decisions. The correct Constitutional standard applicable to protected activity by a bar member is set out in several federal appellate opinions. *In re Oliver*, 452 F.2d 111 (7th Cir., 1971); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir., 1975); *Chase v. Robson*, 435 F.2d 1059 (7th Cir., 1970); *In re Halkin*, 598 F.2d 176 (D.C. Cir., 1979). The speech or conduct of the law practitioner must present a clear and present, imminent threat to the administration of justice in order to warrant imposition of sanctions by a court. In this case Appellant imputed no wrongful motives to any judge or court and there was no moral turpitude or dishonesty affecting the functioning of any forum, judicial or

administrative. No threat by Appellant to the administration of justice was made out. The Bar failed to show why other of its members could with impunity make far more visible statements, ones which were hardly calculated to strenghthen the people's confidence in their courts. See, i.e., exhibits furnished with Appellant's answer to the complaint (written and reported oral comments of federal trial and appellate judges at Miami and New Orleans in 1976-7, painting very bleak pictures of their civil dockets).

By refusing to review Appellant's timely challenges to the Bar's Disciplinary Rules 1-102(A) (6) and 7-106(C) (6) for vagueness and overbreadth, the Supreme Court of Florida has in effect decided this case differently from a federal appellate decision which invalidated a similar rule of broad sweep. *Hirschkopf v. Snead*, 594 F.2d 356 (4th Cir., 1979).

At 397 So.2d 662, the Supreme Court of Florida stated that

> "(s)ince these actions (Appellant) has retained competent responsible counsel. *His counsel has reported to this Court her disfavor with her client's actions* and has so advised her client." (emphasis added)

despite the unmistakably plain words of Disciplinary Rule 7-106(C) (4) in Florida's Code of Professional Responsibility for lawyers, namely:

> DR-7-106. Trial conduct
>
> (C) In appearing in his professional capacity before a tribunal, a lawyer shall not. . .
>
> (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

By relying on the unauthorized adverse opinion of Appellant's counsel as justification for its decision, the Supreme Court of Florida deprived Appellant of his Fourteenth Amendment right to due process of law in connection with his liberty or property.

It capitalized on the ineffectiveness of Appellant's counsel which made the proceeding in the Supreme Court of Florida manifestly and fundamentally unfair. See, i.e., *Fitzgerald v. Estelle*, 505 F.2d 1334, 1336-7 (5th Cir., 1975).

The Supreme Court of Florida has avoided crucial issues of federal law which have not been, but should be, settled by this Court. The question of whether a member of an integrated bar who timely challenged the validity of disciplinary rules adopted by a State's Supreme Court but obtains no review in an original judicial proceeding before that forum is entitled to such review here is a very important matter of federal law which should now be adjudicated. In refusing to review the validity of two of the most broadly sweeping disciplinary rules adopted from the ABA Model Code of Professional Responsibility by more than three quarters of all the States in America, the Supreme Court of Florida has avoided a fundamental issue of federal law which now ought to be decided here. No State's judiciary is inclined to strike down disciplinary rules governing conduct of those admitted to the practice of law in its jurisdiction. A compelling need for federal review exists here.

By ignoring Appellant's timely challenges to Disciplinary Rules 1-102(A) (6) and 7-106(C) (6) the Supreme Court of Florida has decided an important federal question in a way which conflicts with applicable precedents in this Court. *In re Primus*, 436 U.S. 412, 98 S.Ct. 1892, 56 L.Ed.2d 417 (1978) ["broad prophylactic rules in the area of free expression are suspect" and "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms"]; *Mine Workers v. Illinois Bar Ass'n.*, 389 U.S. 217, 222-3, 88 S.Ct. 353, 356, 19 L.Ed.2d 426 (1964).

In completely overlooking the lack of a finding of probable cause as to misconduct required by The Florida Bar's rules before service of a complaint on Appellant which charged misconduct, the Supreme Court of Florida has in essence decided that the Fourteenth Amendment's assurance of due process of law and equal protection of the laws does not apply to the regulation of law practice. This is contrary to numerous decisions of this Court. *Konigsberg v. State Bar*, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957), and at

least three decisions of this Court which hold that "the power of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights." *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); *Sperry v. Florida*, 373 U.S. 379, 83 S.Ct. 1322 19 L.Ed.2d 428 (1963); *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969).

CONCLUSION

The judicial proceeding below was an exercise of the original jurisdiction of a State's Supreme Court involving a fully integrated bar. No appellate review of the important Constitutional questions timely raised below will be available anywhere unless it is granted here. This Court's statutory jurisdiction permits such appeal. 28 U.S.C. §§ 1257 (2), 2104.

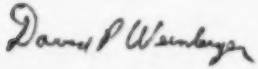
If an appeal is deemed improvidently taken in this case, appellant's jurisdictional statement can be treated as a petition for a writ of ceriorari to the Supreme Court of Florida. 28 U.S.C. §§ 1257 (3), 2103. In that event appellant asks such a writ be granted in the alternative.

CERTIFICATE OF SERVICE

The undersigned, attorney for the appellant herein, hereby certifies that three true and correct copies of the foregoing jurisdictional statement on appeal were served by mail on

John F. Harkness, Jr., Esquire,
Executive Director
THE FLORIDA BAR
Florida Bar Center
Tallahassee FL 32304

and that all parties required to be served have been served. See accompanying affidavit under Local Rule 28.5.(c).



David P. Weinberger
Appellant *pro se*
5920 S.W. 16 Terrace
West Miami FL 33155
(305) 266-3461

Supreme Court of Florida

No. 59, 191

THE FLORIDA BAR, Complainant,
v.
DAVID P. WEINBERGER, Respondent.

[March 19, 1981]

PER CURIAM.

This is a bar disciplinary action in which David P. Weinberger petitions for review of a referee's report recommending a one-year suspension of Weinberger for violation of DR 1-102(A) (6) and DR 7-106(C) (6), Code of Professional Responsibility.[1]

Weinberger, newly admitted to practice law, represented himself in two civil suits arising from termination of his employment by the Florida Department of Commerce. After suffering adverse rulings in those cases, he filed various pleadings and made public statements denigrating the courts and the administration of justice. No useful purpose would be served in repeating those remarks, but they can be described as multiple irresponsible and intemperate attacks on the judiciary. Weinberger himself concluded that "I ought to consider myself rather fortunate that I didn't get cited for contempt."

---

[1]DR 1-102(A) A lawyer shall not:

• • •

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 7-106(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

• • •

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

Besides finding Weinberger guilty of professional misconduct,[2] the referee perceived an extremely intemperate personality. Because of Weinberger's acts of misconduct and his present psychological makeup the referee recommended a one-year suspension.

Weinberger's conduct cannot be condoned, and he is soundly reprimanded for it. At the same time we do not feel that a one-year suspension is proper in this case. Since these incidents occurred, he has retained competent responsible counsel. His counsel has reported to the Court her disfavor with her client's actions and has so advised her client. Weinberger has apologized to two judges involved and has offered to take further action to exhibit his remorse and his subsequently learned appreciation that his actions did not comport with the standards we expect of counsel.

We publicly reprimand David P. Weinberger for his actions with the admonition that any such conduct on his part in the future will be dealt with sternly. Costs in the amount of $2,007.96 are assessed against the respondent.

It is so ordered.

SUNDBERG, C.J., ADKINS, BOYD, OVERTON, ENGLAND and McDONALD, JJ., Concur
ALDERMAN, J., Concurs in part and dissents in part with an opinion

ALDERMAN, J., concurring in part, dissenting in part.

I agree that Weinberger has violated the Code of Professional Responsibility, but I would go beyond the public reprimand imposed by the Court and, as recommended by The Florida Bar, suspend him from the practice of law for ninety-one days and require proof of rehabilitation and a psychological evaluation before reinstatement.

The referee, in his report, finds:

> The testimony beginning at TR 198 when the Respon-

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

[2] There is ample competent evidence to support these findings.

dent became the Referee's witness is most significant because the court hears from Respondent directly about himself. At TR 222 Respondent stated his regrets and apology. He seems to agree that he should not have done what he did and ought not to do so again. Nevertheless, he is without contrition; for he persists in regarding the proper limits of his behavior as those applying to a non-lawyer. After the trial, he wrote two formal letters of apology to the United States District Judges who were involved in the matter. (R 80 and 81). Despite these letters and his apology, it is apparent that Respondent would continue his crusade against the judicial system in the same manner as he is alleged to have acted previously.

Respondent is not on trial for what he thinks he believes, but rather for what he acts out. It is interesting, if not necessarily material, to examine the type of person he is according to the testimony of his witnesses, Dr. Jess Spirer, a clinical psychologist, and the written report from psychiatrist, Dr. Steinbook, dated June 18, 1979. Dr. Steinbook's report was addressed to Michael S. Hoffman, Esq., Respondent's then attorney who has withdrawn from the case because of irreconcilable differences with Respondent. The following words according to the trial transcript may be used to describe Respondent: argumentative, obstinate, persistent, litigious, demanding, determined, harassed, harrassing of others, feeling persecuted, unhappy, lacking in social judgment, a rebel, a reformer, a radical, idealistic, obsessive-compulsive personality with paranoid features, rigid, hypersensitive, excessively self-important, inflexible, intemperate, and unable to maintain satisfactory interpersonal relationships.

From my review of the record, I conclude that Weinberger, at the time he committed the acts of misconduct and also at the time of the referee's hearing, either did not understand or was unwilling to accept the principles that more is expected of a lawyer than is expected of a layman and that any conduct of a lawyer which brings into scorn and disrepute the administration of justice demands condemnation and the application of appropriate penalties. *The Florida Bar in re Shimek*, 284 So.2d 686

(Fla. 1973); *State ex rel. The Florida Bar v. Calhoon*, 102 So.2d 604 (Fla. 1958).

In light of the totality of circumstances in this case, I believe the ninety-one-day suspension recommended by The Florida Bar is an appropriate penalty because it would fairly punish Weinberger for his misconduct, would encourage his rehabilitation, and is severe enough to deter others from similiar misconduct. *The Florida Bar v. Saphirstein*, 376 So.2d 7 (Fla. 1979).

Original Jurisdiction-The Florida Bar

Paul A. Gross, Co-Bar Counsel, Miami, Florida; Scott K. Tozian, Co-Bar Counsel, Tampa, Florida; Stanley A. Spring, Staff Counsel and John A. Boggs, Assistant Staff Counsel, Tallahassee, Florida,
for Complainant

M. Minnette Massey, Coral Gables, Florida
for Respondent

reh.den. May 22, 1981. 397 So.2d 661.

IN THE SUPREME COURT
OF FLORIDA
FRIDAY, MAY 22, 1981

THE FLORIDA BAR, **
Complainant, **
vs. ** CASE NO. 59,191
DAVID P. WEINBERGER, **
Respondent. **

On consideration of the motion for rehearing filed by attorney for respondent, and reply thereto

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court
By:
Deputy Clerk

C
cc: M. Minnette Massey, Esquire
Paul A. Gross, Esquire
Stanley A. Spring, Esquire
John F.Harkness, Jr., Esquire
John A. Boggs, Esquire
Scott K. Tozian, Esquire

IN THE SUPREME COURT
OF FLORIDA
(Before a Referee)

THE FLORIDA BAR, CASE NO. 11G78M35

Complainant,

vs.

DAVID P. WEINBERGER

Respondent.

REPORT OF REFEREE

The above-captioned matter was referred to me by The Florida Bar on August 23, 1978 to serve as Referee. I have handled the matter from the time it was so assigned until the present time. I have the honor to report as follows:

THE RECORD

The record in this case consists of pleadings and correspondence which have been assembled in chronological order, identified by consecutive numbers, and indexed for easy access. Although the pleadings and correspondence are voluminous, the substance of the matter is found in the Complaint and Answer.

In addition to the pleadings and correspondence, the transcript of the trial held on August 30, 1979, and the transcripts of three pretrial hearings held on January 23, 1979, March 13, 1979 and June 5, 1979 are contained in separate bound volumes.

At the trial the Complainant introduced seven exhibits into evidence and Respondent introduced three exhibits, all ten of which are separate from the trial transcript, but indexed therein. Complainant produced two witnesses at trial; Respondent produced three witnesses, and Respondent testified as the Referee's witness.

Although the Complaint was founded upon a violation of DR 1-102 (A) (6), at the conclusion of the trial Complainant

moved to amend the Complaint to include DR 7-106 (C) (6) as a ground for disciplining Respondent. Inasmuch as Rule 11.06(3) (a) of Article X of the Integration Rule of The Florida State Bar incorporates the Florida Rules of Civil Procedure in Florida Bar grievance proceedings, there is authority to permit the pleadings to conform to the proof.

The Referee herewith grants the motion by Complainant to so amend, finding that such amendment does not catch the Respondent by surprise or require the opportunity to provide other or additional defensive material.

Following the trial, memoranda were submitted by each side. These are Respondent's Memorandum of Law, Complainant's Memorandum of Law, Respondent's Reply to Complainant's Post Trial Answer Brief and Complainant's Response to Respondent's Reply Memorandum.

The trial transcript will be referred to as "TR" and the Record as "R".

THE ISSUES

The 11th Judicial Circuit Grievance Committee Report Finding Probable Cause was a unanimous finding that Respondent was probably guilty of violating Disciplinary Rule 1-102 (A) (6): "A lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law."

The gist of the Complaint is found in paragraphs 6 through 9 thereof: where it is alleged that Respondent stated in various pleadings filed in various court actions: that a judge's order looked like the work of a law clerk and a recruit at that; that the environment in federal practice is fast approaching that of the jungles in this state's courts; that he was tired of being victimized by charades and outright hooliganism which seem to be tolerated by the federal court, and that there was almost a total breakdown in the administration of civil justice in the Federal District Court of Miami and the Fifth Circuit Court of Appeals in New Orleans.

Respondent's Answer to the Complaint and other pleadings filed contain a general denial and the following affirmative defenses: that the acts complained of were in the course of his engaging in the practice of the law; that he is not incapacitated or otherwise unfit to practice law; that DR 1-102(A) (6) does not apply in a case where an attorney is representing himself;

that the statements he allegedly made were an exercise of free expression protected by the U.S. Constitution and the Florida Constitution; that the statements are privileged; that those statements are true; that DR 1-102(A)(6) is unconstitutional for being over-broad and without any standards for application; that this disciplinary proceeding is vindictive and a reprisal; that no client has been injured, and that the judges in whose court the objectionable pleadings were filed failed to cite him for contempt.

WAIVER OF CONFIDENTIALITY

Respondent moved the Referee to permit him to waive all confidentiality in these proceedings. Without objection by Complainant, the Referee ordered that confidentiality be waived and that the proceedings be continued as an open trial.

THE TRIAL

The testimony and exhibits of Complainant constitute substantial and convincing proof of the allegations of the Complaint.

The testimony beginning at TR 198 when the Respondent became the Referee's witness is most significant because the court hears from Respondent directly about himself. At TR 222 Respondent stated his regrets and apology. He seems to agree that he should not have done what he did and ought not to do so again. Nevertheless, he is without contrition; for he persists in regarding the proper limits of his behavior as those applying to a non-lawyer. After the trial, he wrote two formal letters of apology to the Unites States District Judges who were involved in the matter. (R 80 and 81). Despite these letters and his apology, it is apparent that Respondent would continue his crusade against the judicial system in the same manner as he is alleged to have acted previously.

Respondent is not on trial for what he thinks he believes, but rather for what he acts out. It is interesting, if not necessarily material, to examine the type of person his is according to the testimony of his witnesses, Dr. Jess Spirer, a clinical psychologist, and the written report from a psychiatrist, Dr. Steinbook, dated June 18, 1979. Dr. Steinbook's report was addressed to Michael S. Hoffman, Esq., Respondent's then attorney who has withdrawn from the case because of irreconcilable dif-

ferences with Respondent. The following words according to the trial transcript may be used to describe Respondent: argumentative, obstinate, persistent, litigious, demanding, determined, harassed, harrassing of others, feeling persecuted, unhappy, lacking in social judgement, a rebel, a reformer, a radical, idealistic, obsessive-compulsive personality with paranoid features, rigid, hypersensitive, excessively self-important, inflexible, intemperate, and unable to maintain satisfactory interpersonal relationships.

FINDINGS OF FACT

1. As alleged in the Complaint, Respondent has conducted himself in a manner that adversely reflects his fitness to practice law. His conduct has been undignified, discourteous and degrading to a judicial tribunal.

2. The allegations in the Complaint have been proven by overwhelmingly substantial and convincing evidence.

3. The conduct of Respondent as alleged in the Complaint falls short of the requirements enunciated in the Integration Rule relating to the behavior required of a member of The Florida Bar.

4. Respondent's two letters of apology to the Judges involved have been taken into consideration in determining the extent to which Respondent ought to be disciplined.

5. The Referee finds no past disciplinary measures have been applied to Respondent.

CONCLUSIONS OF LAW

1. A. The Referee finds that the proof supports a finding materially relevant to DR 7-106(C) (6) to the effect that in appearing in his professional capacity before a tribunal, a lawyer shall not engage in undignified or discourteous conduct which is degrading to a tribunal.

B. Referee cannot agree with Respondent's contention that DR 1-102(A) (6) and DR 7-106(C) (6) are invalid for vagueness or for overbreadth. In addition to the arguments set forth in Complainant's Response to Respondent's Reply Memorandum, Referee emphasizes his belief that to a significant degree, the station in life of the person to whom the language in question is intended to apply controls the answer to the question, "is it vague?" or "is it overbroad?" Language ap-

plied to firemen or military recruits may be vague or overbroad, while the same language applied to members of The Florida Bar would not be.

C. Referee lays heavy stress on the language of the Supreme Court as stated in *The Florida Bar vs. Calhoon* 102 So. 2d 604 (Fla. 1958) and ratified in *The Florida Bar vs. Shimek* 284 So. 2d 686 (Fla. 1973):

> . . . .if the Bench and Bar of the area were being assaulted from all angles, with or without justification, it would be the duty of the lawyer above all others to exercise every measure of care and caution to avoid creating any justification for the suspicions. We have on numerous occasions stated that by the very nature of his profession as well as the license under which he does business, more is expected of a lawyer than of a layman who is not invested with the high degree of responsibility and the may fiduciary relations imposed upon a member of the Bar. 102 So. 2d at 608.

D. Respondent argues that it is not clear what is or is not the practice of law. He suggests that in representing himself he had no client and was not acting as a lawyer. Therefore, his pronouncements were privileged under the Federal and Florida constitutions. It is the Referee's belief that when one becomes a member of The Florida Bar, he does so on a twenty-four-hour-a-day basis insofar as his conduct is concerned. He is not a part-time layman and part-time lawyer. He is a professional and regarded by the world as such. Similarly, a priest, minister, rabbi, doctor and judge are examples of professionals who cannot doff the code of conduct expected of them as they would their hats.

2. The Referee recommends that the Respondent by found guilty of violation of DR 1-102(A) (6) and DR 7-106(D) (6) justifying disciplinary measures.

3. The Referee recommends that the Respondent be suspended under Rule 11.10 (3) from the practice of law for a period of one year. During this suspension period Respondent shall continue to be a member of The Florida Bar, but shall not have the priviledge of practicing law. Referee further recommends that there be no automatic eligibility for full privileges of membership in The Florida Bar, but that reinstatement be considered in accordance with the provisions of Rule 11.11. At such

time as a petition for reinstatement is filed, due consideration of the entire record of these proceedings should be given as the same may relate to the Respondent's then attitudes, his understanding of the Integration Rule, and in particular, his understanding of and willingness to comply with the Code of Professional Responsiblity.

It is not an easy or pleasant task to recommend disciplinary measures to be applied to a member of The Florida Bar and Referee has given careful consideration to this matter. Probation or public reprimand are clearly inappropriate; and disbarment surely too drastic. Suspension for a reasonable period is the most appropriate recommendation.

4. Pursuant to Integration Rule 11.06 (9) (a) (5) the Referee finds the costs in this proceeding to be the following:

(a)	At the Grievance Committee level:	
	Adminstrative costs	$ 50.00
	Court Reporter charges	546.20
(b)	At the Referee level:	
(b)	Administrative Costs	50.00
	Court Reporter charges	1,094.95
	Postage	19.59
	Reproduction costs	156.45
	Long-distance telephones	16.77
	Witness travel expenses	74.00
Total Costs		$2,007.96

The Referee recommends the costs in the amount of $2,007.96 be assessed against the Respondent and paid to the Complainant.

Respectfully submitted,

Alvin Cassel
Referee
1108 Kane Concourse
Bay Harbor Islands, Florida 33154
(305) 868-1000

Dated: December 19, 1979

IN THE SUPREME COURT OF FLORIDA

Docket No. 59,191

THE FLORIDA BAR, *Complainant:*

v. : NOTICE OF APPEAL

DAVID P. WEINBERGER, *Respondent:*

Respondent David P. Weinberger hereby enters his notice of appeal from this Court's final order dated May 22nd, 1981, to the United States Supreme Court under Title 28, Sections 1257 and 2104, pursuant to Rule 10.3., United States Supreme Court.

Respectfully submitted by: _____

David P. Weinberger, *pro se*
5920 S.W. 16 Terrace
West Miami FL 33155
(305) 266-3461

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true copy of this notice was mailed to Scott K. Tozian, Esquire, at The Florida Bar, 420 W. Platt St., Tampa FL 33606, on this 29th day of May, 1981, per the certificate of mailing attached below:

_____

(with certificate of mailing on copy filed with Supreme Court of Florida)

IN THE SUPREME COURT OF FLORIDA

Docket No. 59,191

THE FLORIDA BAR, *Complainant,)*

v.) AMENDED NOTICE OF APPEAL

DAVID P. WEINBERGER *Respondent*)

Respondent David P. Weinberger hereby enters this amended notice that review of this Court's final order of May 22, 1981 will be sought in the United States Supreme Court, either by appeal* or alternatively by writ of certiorari as authorized by 28 U.S.C. Section 1257, and in accordance with 28 U.S.C. Section 2104 and Rule 10.3. of the United States Supreme Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT true copies of this notice were mailed to the Executive Director of The Florida Bar, Tallahassee Fl 32304 and to the Office of the Clerk of the United States Supreme Court on this SEVENTH day of JULY, 1981.

* see *In re Primus*, 436 US 412, 98 SCt 1983, 56 LEd2d 417 and *Ohralik v. Ohio State Bar Assn.*, 436 US 447, 98 SCt 1912, 56 LEd2d 444 (1978)

David P. Weinberger, *pro se*,
Florida Bar #187422
5920 S.W. 16 Terrace
West Miami Fl 33155
(305) 266-3461

(with certificate of mailing on copy filed with Supreme Court of Florida)

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
SEP 23 1981
ALEXANDER L. STEVAS
CLERK

NO. 81-317

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

DAVID P. WEINBERGER,

Appellant,

vs.

THE FLORIDA BAR,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF FLORIDA

APPELLEE'S MOTION TO DISMISS APPEAL

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Of Counsel

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NO. 81-317

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

DAVID P. WEINBERGER,

Appellant,

vs.

THE FLORIDA BAR,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF FLORIDA

APPELLEE'S MOTION TO DISMISS APPEAL

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that this appeal be dismissed on the ground that the Florida State Court's decision is so obviously correct as not to warrant further argument or consideration by this Court.

STATEMENT

This is a direct appeal from a judgment of the Supreme Court of Florida, filed March 19, 1981, finding Appellant, a Florida attorney, guilty of, and reprimanding him for, unprofessional conduct. Appellant's petition for rehearing was denied May 22, 1981.

In 1966-67 Appellant Weinberger (hereinafter Weinberger) was engaged in opposing termination of his employment with a Florida state agency in three federal court actions, each brought under different theories and against different defendants. After suffering adverse rulings in each case, he filed various motions and made public statements denigrating the federal courts and the administration of justice, which remarks were described by the Florida Supreme Court as

> . . . multiple irresponsible and intemperate attacks on the judiciary. Weinberger himself concluded that "I ought to consider myself rather fortunate

> that I didn't get cited for contempt." (App. p. 1) 1/

In disciplinary proceedings brought against Weinberger because of his attacks on the federal judiciary and the judicial system, Weinberger faced charges of violating the Florida Bar Code of Professional Responsibility, which is substantially identical with the ABA Code of Professional Responsibility. Following a written complaint by The Florida Bar, trial before a referee, and referee's report finding Weinberger guilty of professional misconduct and recommending a year's suspension, the Board of Governors of The Florida Bar reviewed the case and recommended 91 days' suspension instead of a year. The Florida Supreme Court reviewed the disciplinary proceedings, and agreed with the finding of unprofessional conduct, but reduced the discipline to a

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1/ All appendix citations are to the Appendix to Appellant's jurisdictional statement.

public reprimand. The Florida Bar v. Weinberger, 397 So. 2d 661 (Fla. 1981).

Weinberger brings this appeal seeking yet another review of his admittedly intemperate remarks attacking the judiciary and the judicial system. In his appeal to this Court, Weinberger seeks to claim that (1) he was protected from discipline for his remarks by the First Amendment to the Constitution of the United States; that (2) he was denied due process of law in the disciplinary proceedings; and that (3) he was denied equal protection of the law in the disciplinary proceedings.

ARGUMENT

The decision of the Florida Supreme Court is plainly correct. With respect to his First Amendment privilege, Weinberger asserts, in substance, that any infringement on his right to speak out in whatever way he pleases against the judiciary results in making him a second class citizen because he is an attorney. But, as this Court, in Theard v. United States, 354 U.S. 278 (1957), reviewing the control that a court has over a lawyer's professional life, stated, at 354 U.S. 281:

> The matter was compendiously put by Mr. Justice Cardozo . . . "Membership in the bar is a privilege burdened with conditions."

A.

APPELLANT'S CLAIM OF FIRST AMENDMENT PROTECTION FOR HIS ATTACK UPON THE COURT IS WITHOUT MERIT.

It should be noted at the outset that despite Appellant's sophistical attempt to

invoke this Court's jurisdiction, at least in part, by his claim that the First Amendment to the Constitution protects a lawyer's public denigration of the judiciary and the judicial system, and despite his accusation that the Florida Court ignored this claim, he is unable to cite authority for his position.

Furthermore, it is obvious from the Florida Supreme Court's opinion that the opposite is true.

The Florida Supreme Court's opinion, based upon review of a record replete with samples of Weinberger's conduct, which conduct he not only does not deny, but admits would have justified a contempt ruling, conforms with the Florida Court's prior decisions disciplining attorneys for similar unprofessional conduct. Thus, in The Florida Bar in re Shimek, 284 So. 2d 686 (Fla. 1973), a case very similar factually to the present one, the respondent attorney argued that the First Amendment to the Constitution of the United States

bars disciplining an attorney for accusations against the judiciary. The Florida Supreme Court rejected this contention, 284 So. 2d 689, and quoted at length from its earlier decision of State ex rel. The Florida Bar v. Calhoon, 102 So. 2d 604, 608 (Fla. 1958), where the Florida Court met an argument that consideration be given to ameliorating an errant attorney's misconduct in attacking a judge because of the low esteem in which the judiciary was allegedly held in the locality by saying, at 102 So. 2d 608:

> If the respondent were a layman this element might properly enter into our deliberations. No so with a lawyer. On the contrary it appears to us that if the Bench and Bar of the area were being assaulted from all angles, with or without justification, it would be the duty of the lawyer above all others to exercise every measure of care and caution to avoid creating any justification for the suspicions. We have on numerous occasions stated that by the very nature of his profession as well as the license under which he does business, more is expected of a lawyer than of a layman who is not invested with

> the high degree of responsibility and the many fiduciary relations imposed upon a member of the Bar.
>
> It would be contrary to every democratic theorem to hold that a judge or a court is beyond bona fide comments and criticisms which do not exceed the bounds of decency and truth or which are not aimed at the destruction of public confidence in the judicial system as such. However, when the likely impairment of the administration of justice is the direct product of false and scandalous accusations then the rule is otherwise. 5 Am. Jur., Attorneys at Law, Sec. 266, p. 420.

That these prior decisions were considered by the Court in Appellant's case is obvious from the separate opinion in filed by Justice Alderman, 397 So. 2d 661, 663 (Fla. 1981) (Concurring in part and dissenting in part). As authority for his position that Appellant's penalty should be more stringent, he cites the Supreme Court opinions in The Florida Bar in re Shimek, supra, and State ex rel. The Florida Bar v. Calhoon, supra.

Appellee next asserts that the Florida Supreme Court has decided a federal claim in a way which conflicts with federal appellate decisions. (Appellant's Jurisdictional Statement page 14). Yet none of the cases cited by Appellant stand for the proposition that the First Amendment prevents a court from disciplining an attorney who makes denigrating attacks upon the judiciary. These cases, rather, concern blanket prohibitions against all extrajudicial comment regarding pending litigation by attorneys involved in that litigation.

There appear to be no Supreme Court decisions directly on point. The weight of federal authority, however, is aligned with that of the Florida Supreme Court.

In In re Chopak, 160 F.2d 886, 887 (2d Cir. 1947), cert. denied, 67 S.Ct. 1516 (1947), the Circuit Court of Appeals for the Second Circuit affirmed a District Court's order of three years' suspension of an attorney for an insulting letter addressed to a judge. The dissent argued

that the punishment was too harsh, stating, at 160 F.2d 887:

> Emphatically and eloquently the Supreme Court has safeguarded the right, even the duty, of free general and public criticism of the courts against repression by fines for contempt.

Thus it is clear that First Amendment rights were considered, and rejected, in Chopak.

In Bradley v. Fisher, 80 U.S. 646, S.Ct. 13 Wall 335-357 (1872) this Court examined an attempt by an attorney to institute a civil action against a judge of the criminal court in the District of Columbia for his order disbarring the attorney from the Supreme Court of D.C. (That order had previously been stricken). The Court affirmed the general rule proscribing civil liability of a judge for actions taken in the exercise of his jurisdiction. Further, the Court discussed the professional conduct required

of an attorney to courts of justice. In the Court's own words:

> . . . On the other hand, the obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the Bar, is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts.

80 U.S. at 652.

Obviously the authorities support the power of courts to discipline attorneys for unwarranted and unprofessional attacks upon the judiciary. See also, In the Matter of Harlan E. Grimes, 364 F.2d 654 (10th Cir. 1966) (Attorneys disbarred for accusations against the judiciary concerning integrity of certain judges).

It is submitted that Weinberger's claim to protection under the First Amendment is without merit.

B.

APPELLANT'S CLAIM OF VIOLATION OF DUE PROCESS IS WITHOUT MERIT.

Appellant is again unable to cite authority for the proposition that the judicial review received in his case, as provided for by Florida Bar Integration Rule, Article XI, Rule 11.09(1) violates his due process. Happily, the case law has not gone beyond requiring fair notice of the charges, an opportunity to be heard and for judicial review. Randall v. Brigham, 74 U.S. 523, 7 Wall. 523, 540, 19 L.Ed. 285, 293 (1896); In re Sarelas, 360 F. Supp. 794, 797 (N.D. Ill. 1973) affirmed, 497 F.2d 926 (7th Cir. 1974); cf. Goldberg v. Kelly, 397 U.S. 254, 257, 269, 90 S.Ct. 1011, 1020-21, 25 L.Ed.2d 287 (1970).

Appellee further asserts that the Supreme Court of Florida has violated his

Fourteenth Amendment assurance of due process because it allegedly did not fault the grievance committee for a lack of finding of probable cause as to misconduct before filing the complaint. Apparently, although not specifically stated, Appellant is somehow trying to claim did not have notice of the charges contained in the complaint. He fails to do so.

He says (Appellant's Jurisdictional Statement, p. 16):

> In completely overlooking the lack of a finding of probable cause as to misconduct required by The Florida Bar's rule before service of the complaint on Appellant which charged misconduct, the Supreme Court of Florida has in essence decided that the Fourteenth Amendment's assurance of due process of law and equal protection of the laws does not apply to the regulation of law practice.

Weinberger's claim that there was no finding of probable cause is a misrepresentation. This is best exemplified by

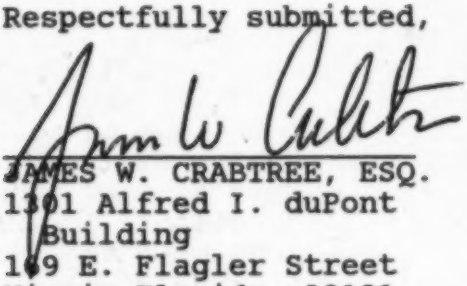
his failure to present anything to this Court in support of such claim.

At trial, Appellant testified and cross-examined. He also participated at both Grievance Committee hearings. These facts are not disputed by Appellant.

CONCLUSION

The appeal should be dismissed.

Respectfully submitted,



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Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of September, 1981, three copies of the foregoing Motion to Dismiss have been served by First Class United States Mail, post paid, on:

David P. Weinberger
Appellant pro se
5920 S.W. 16th Terrace
West Miami, FL 33155

By the foregoing service all parties required to be served have been served.

James W. Crabtree

JAMES W. CRABTREE, ESQ.